Filed 8/15/19 P. v. Zapien CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ZAPIEN,

Defendant and Appellant.

F075602

(Super. Ct. No. BF143567A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Campbell Whitten and Jesse Whitten for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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On August 2013, Appellant Jose Zapien was convicted of multiple counts and enhancements in Kern County Superior Court, case No. BF143567A, and sentenced to state prison for 41 years to life. Zapien appealed his conviction in this court, and on April 20, 2016, we found that the judge presiding at the trial readiness hearing failed to

properly address Zapien's request to discharge his privately retained counsel before trial. We therefore reversed his conviction and remanded for retrial (case No. F069304).

This appeal follows Zapien's second jury trial. Zapien alleges multiple errors involving the photographic lineups used to identify him, as well as claiming prosecutorial misconduct in several instances and cumulative error. We affirm.

STATEMENT OF THE CASE

An amended information filed October 18, 2016, charged Zapien with the following Penal Code[1] violations: in counts 1 and 2 of kidnapping (§ 207, subd. (a)); in counts 3 and 4 of assault with a firearm (§ 245, subd. (a)(2)); in counts 5 and 6 of making criminal threats (§ 422); in counts 7 and 8 of false imprisonment (§ 236); in count 9 of grand theft (§ 487, subd. (a)); in count 10 of carjacking (§ 215, subd. (a)); in counts 11 and 12 of second degree robbery (§ 212.5, subd. (c)); and in counts 13 and 14 with two counts of kidnapping with the intent to commit a robbery (§ 209, subd. (b)(1)). As to counts 1 through 12, it was alleged that Zapien personally used a firearm pursuant to section 12022.5, subdivision (a), and as to counts 1 and 2 and 10 through 14, personally used a firearm pursuant to section 12022.53, subdivision (b).

On October 31, 2016, a jury found Zapien guilty on all counts. The jury further found the section 12022.5, subdivision (a) firearm enhancement true as to counts 5 through 9, and the section 12022.53, subdivision (b) enhancement true as to counts 1 and 2 and 10 through 14. Zapien was sentenced to state prison for two terms of life with the possibility of parole after seven years, plus a determinate term of 39 years.

STATEMENT OF THE FACTS

In April of 2012, Juan Fierros, who was living in Delano, wanted to have a sound/video system installed in his Cadillac Escalade. While at a stereo shop, Fierros

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[1] All further statutory references are to the Penal Code unless noted otherwise.

was approached by Ricardo Alvarez, who offered to install the equipment for less money. Fierros took Alvarez up on his offer.

Alvarez began work on the vehicle at his house, but was unable to complete the installation, so Fierros said he would return with the vehicle another day. On April 15, 2012, Fierros sent a text message to Alvarez asking if he still wanted him to come to his house to complete the installation. Alvarez responded he would text Fierros when he was ready for Fierros to come by. Fierros did not hear from Alvarez for awhile, and when he did, Alvarez was upset, texting that he had been waiting for him.

Later that day, Fierros and his nephew Oscar Arreola went to Alvarez's house around 3:00 p.m. When Fierros arrived, he saw Alvarez and another man run into the backyard through the side gate. Fierros went to the side gate, where Alvarez "popped out" from the side of the house and told him to wait. When Alvarez did come out of the house, he told Fierros to back the vehicle into the driveway.

Once the vehicle was in place, Alvarez asked for the keys to the vehicle and got in. Fierros heard items breaking inside the vehicle and observed Alvarez ripping out the center console and clipping wires. Fierros then saw two vehicles approach the house: one a gold 1990's Toyota Camry and the other a dark blue or black vehicle. Ten men got out of the vehicles, all of them wearing nylons over their faces, with baggy red T-shirts, baggy pants, and guns. The men approached Fierros from behind and hit him with the back of a gun, causing him to fall to the ground. The men kicked Fierros and zip tied his hands behind his back. He was then loaded into the vehicle behind the driver seat.

The men also attacked Arreola, who also fell to the ground. Once on the ground, one man held Arreola down and took his keys, cell phone and money. His hands were also zip tied and he was thrown into the vehicle, ending up behind the passenger seat.

After Fierros and Arreola were in the vehicle, Zapien got in the front passenger seat of the vehicle and threatened the two with a gun, telling them to "look down" or he would "fuckin' smoke" them. At this point, nothing obstructed Fierros's view of Zapien.

Although Zapien had a black nylon over his face, Fierros was able to see through it and observe a stud piercing on Zapien's left eyebrow and a "little gash" where the hair on his left eyebrow was missing. Zapien did not have any facial tattoos,[2] but had a tattoo on his forearm that appeared to look like the letter "N." Fierros assumed the tattoo "N" signified Norteño, as there were many in the area, and all of the men were dressed in red.

Another of the men got into the vehicle and began driving. Zapien was facing Fierros and Arreola with the gun pointing at them. When Fierros tried to look at Zapien, Zapien would threaten him and tell him to look down. Zapien told Fierros they had been planning this for weeks and that he was a "stupid ass fool" for driving a Cadillac Escalade with 30-inch rims. Zapien mentioned that they had heard Fierros had money and they were going to hold him for ransom. Fierros pleaded with Zapien to take the vehicle and let him go because he had children. Zapien told Fierros he also had children and needed money, so he was going to call Fierros's family and tell them to "cough up" money if they wanted him alive.

They drove for 15 to 30 minutes with Zapien giving orders as to where to go. Eventually they stopped between two orchards. The other two vehicles seen at the Alvarez house were also there. Once there, Zapien and the other men pulled Fierros and Arreola from the vehicle and punched them in the head and ribs.

At Zapien's orders, the men searched Fierros and found $300 in cash, his phone and a rosary. Zapien again said they were going to have to "smoke your bitch-ass." After the men took Fierros's property, Zapien removed his nylon and asked Fierros, who was just two feet away, if he had seen his face. When Fierros said yes, Zapien said, "[w]ell, this is the last time," and ordered the others to take Fierros and Arreola into the orchard and "smoke them." Before moving them, Zapien spit in Fierros's face and the others then blindfolded him with a T-shirt. The men escorting Fierros and Arreola were

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[2] At the time of trial, Zapien had facial tattoos.

armed with a semi-automatic handgun with an extended magazine. Eventually the men asked Zapien, whom they referred to as "Tinman," if they were far enough, but he directed them to continue further into the orchard.

As they walked in the orchard, the men asked Fierros if he had any last wishes. Fierros said he wished to talk to his children, to which the men laughed and said his family should give them some money and he would be let go. Fierros was dropped to his knees and Arreola was forced to lie on the ground and look away from the direction of the Escalade. While on the ground, Arreola heard power tools and people racing around.

Eventually, Fierros heard sirens and the men watching over him took off running, leaving Fierros and Arreola in the orchard. Once Fierros was able to remove the blindfold, he saw police cars in the distance. Fierros and Arreola ran towards a house where they encountered the homeowner, Mariano Balbuena, who had just called the Sheriff's Department.

At approximately 8:00 p.m. on April 15, 2012, Sheriff's Deputy Rosalio Galvez was dispatched to an area where he observed three vehicles parked on a dirt road. One of the vehicles was an SUV that was "lifted up" and missing the rear wheels. As one of the vehicles began to drive away, Deputy Galvez activated his red light and initiated a traffic stop. A Hispanic male ran from the area and got into another vehicle. Neither vehicle yielded to Deputy Galvez and, due to road conditions, he was unable to pursue them.

At 8:42 p.m., Police Officer Martin Cervantes was dispatched to the Balbuena residence where he found Fierros and Arreola with zip ties on their wrists, which he cut off. Officer Cervantes and other officers and deputies set up a perimeter search of the orchards.

At around midnight, Officer Cervantes put together a photo lineup to show Arreola and Fierros. Arreola identified Christopher Ortiz in one lineup, but not in another; Fierros did not make an identification.

On June 27, 2012, Delano Police Officer Michael Strand took photos of Zapien. In doing so, Officer Strand noticed Zapien had a "hash mark" in both eyebrows where the hair was missing. He had a metal piercing in his left eyebrow. Zapien had an "old English" "D" tattoo on his arm, which could be construed as an "N" due to additional ink on the bottom of the letter. At the time Officer Strand photographed Zapien, he did not have any tattoos on his face. At trial, he had a tattoo under his right eye. Officer Strand believed Zapien's moniker was "Triste," although it was common for individuals to give officers fake monikers.

On August 29, 2012, Officer Raymond Guerrero showed Fierros several lineups, which included photos of Zapien taken by Officer Strand on June 27. Fierros identified Zapien as the suspect. Officer Guerrero admonished Fierros not to identify someone off of facial hair or tattoos and not to make a selection unless he was 100 percent sure. Fierros said he was 110 percent sure that Zapien was the man who held him at gunpoint and had taken him to the orchard.

Defense

Zapien's sister, Connie Lozcano, testified she was at a family barbeque with Zapien on April 15, 2012. Lozcano was at the barbeque from 4:00 p.m. to around 9:00 p.m. and Zapien was there the entire time. When asked why she had not come forward with this information for almost a year, Lozcano explained that she was not aware of the date of the crimes Zapien was accused of committing.

Zapien's ex-girlfriend, Jaclin Lopez, testified similarly: that she and Zapien had been at the barbeque on April 15, 2012, that they arrived between 4:00 and 4:15 p.m. and stayed until 9:30 p.m., and that she had not come forward for almost a year because she was not aware of the date of the crimes Zapien was accused of committing.

Dr. Robert Shomer, a research psychologist, testified regarding issues surrounding eyewitness identification. Dr. Shomer opined that in-court identifications are very

suggestive and that it is extremely important that a "non-suggestive set of photographs" be used for a photographic lineup or the subsequent identification may be invalid.

DISCUSSION

PART I

Zapien's defense theory revolved around the lack of incriminating evidence, his two alibi witnesses, and primarily the fallibility of eyewitness identification. Zapien's first five issues on appeal involve the eyewitness identification of Zapien through various photographic lineups.

A. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT PREVENTED ZAPIEN FROM QUESTIONING FIERROS AT THE EVIDENCE CODE SECTION 402 HEARING ABOUT COURT'S EXHIBIT 5?

Zapien first contends the trial court erred in limiting defense counsel's questioning during a pretrial Evidence Code section 402 hearing (402 hearing), denying him his right to a fair trial. Specifically, Zapien argues that, in order to show that the initial August 2012 identification of Zapien was the result of a suggestive procedure and therefore tainted and inadmissible, he should have been able to question Fierros regarding court's exhibit 5, which included two photos of Zapien. We find no prejudicial error.

Background

On October 17, 2016, the first day of trial, defense counsel sought permission, via an in limine motion, to speak with the prosecution's witnesses before they testified to "have them look at some photos without being able to simply look at Mr. Zapien" in court to identify him. Defense counsel argued the questioning was necessary to assess the reliability of the witnesses' prior identifications of Zapien, noting the six-pack photo lineup used for Fierros's August 2012 identification showed Zapien as the only individual with a "slashed" eyebrow, a detail given of the perpetrator. The prosecution opposed the

request.[3] The trial court determined that it would ask the witnesses if they were willing to meet with defense counsel "and then go from there."

On October 18, 2016, the prosecution filed an opposition to defense counsel's motion for a hearing "for the purpose of conducting a line-up identification of the witnesses", arguing that the defense was essentially requesting a 402 hearing. Defense counsel countered he was not seeking a 402 hearing nor attempting to recreate a live lineup, but "simply" wished to ask the witnesses if they were willing to take a few minutes to talk to the defense investigator and, if not, defense counsel would ask for a "brief voir dire," not a "full 402 hearing."

The following day, defense counsel acknowledged that he was, in fact, seeking a 402 hearing as to the issue of whether the identifications were unduly suggestive and therefore not admissible. He also stated he would withdraw his request for a 402 hearing if the witnesses were willing to speak to him. Fierros declined to meet with defense counsel, and defense counsel filed a brief in support of a 402 hearing on October 20.

The prosecution argued that it would be improper to have the witnesses testify for the purpose of determining whether or not the lineup was suggestive, as the witnesses were not responsible for making such a determination. Defense counsel stated he wished to ask Fierros questions "about the facts of the identification" and use his responses to argue the lineup was unduly suggestive.

The trial court opined the best way to proceed was to call the officer who conducted the lineup. According to the prosecution, Officer Guerrero, who conducted the lineup, would not be available until the afternoon. Defense counsel responded that Fierros's identification was tainted and he simply wished to "briefly test[] that" at the

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[3] As background, Fierros had earlier made in court identifications of Zapien as the perpetrator at the 2012 preliminary hearing and the first trial in 2013.

hearing by questioning Fierros. The prosecution again objected, stating defense counsel would improperly get "a free swing at the witness."

Defense counsel, again noting that the photo of Zapien in the August 2012 lineup had a slashed eyebrow, explained that his plan was to show Fierros, outside the presence of Zapien, a photo of Zapien *without* the slashed eyebrow to see if he could still identify him. If he was not able to, then defense counsel would argue that the lineup as originally shown him was unduly suggestive. The prosecution again objected, arguing that the purpose of a 402 hearing to exclude a suggestive lineup identification revolved around the conduct of the officers, not the witnesses.

The trial court then read Officer Guerrero's report on the August 2012 lineup, which was attached as an exhibit to defendant's section 402 brief. In the report, the officer stated that Fierros, when shown the photo lineup, identified Zapien "within seven seconds." When Officer Guerrero asked Fierros how sure he was about the person he identified, Fierros said:

> "I know you say don't go by facial hair and all that, but it's his exact same face and he still has that little eyebrow and that same little goatee. His face, his nose, his eyes, and everything are the same."

When Officer Guerrero asked Fierros what was significant about Zapien's eye, he stated, "he had his little eyebrow cut and he had a little piercing, like a little silver piercing." Officer Guerrero then asked Fierros what it was that lead him to believe Zapien was the same suspect as the one in the incident, Fierros said, "the same look he has. He always looks like he is high, his eyes are real low." The officer's report also recounted that Fierros said Zapien had a nylon over his face, which he took off and then asked if Fierros had seen his face. When Fierros said he had, Zapien threatened him.

The trial court ultimately determined that it was "compelled" to grant Zapien's request for a 402 hearing and have Fierros testify, but it did not want the hearing to turn into a "fishing expedition," limiting the issue to Fierros's identification of Zapien. The

trial court stated defense counsel could show Fierros the lineup that was initially used with the original markings on it and a lineup "that doesn't have the circle around it, you can use that or however you want to do it." When asked if he intended to show Fierros a lineup different than shown to him before, defense counsel stated he anticipated doing so, depending on the answers given by Fierros.

Before Fierros testified, Zapien was excused, at his request, from the courtroom. Defense counsel then questioned Fierros regarding his identification of Zapien and was shown a copy of a photo lineup, court's exhibit 1, which he was previously shown on August 29, 2012, by Officer Guerrero, with a circle around it and Fierros's initials. Fierros identified Zapien in position 6. Fierros was then shown another lineup, court's exhibit 3, in which the previous lineup had been modified by defense counsel and Zapien placed in a different position. Fierros again identified Zapien, this time in position 2.

Defense counsel then sought to show Fierros "one final set of photos," court's exhibit 5. However, the prosecution objected, noting that the photos in this lineup were of poor quality, color and questioned whether it was a booking photo. The trial court sustained the objection, and defense counsel did not question Fierros further or attempt to lay a further foundation.

Defense counsel then argued that the lineup procedure was unduly suggestive because there was only one suspect in the lineup with a "slash to the eyebrow or eyebrow ring." The prosecution disagreed, noting that all of the individuals in the lineup appeared to be of the same race, age, and background, and that defense counsel failed to establish any suggestiveness. As argued by the prosecutor, "Instead of asking the witness at the hearing about factors that he took into consideration in viewing the photograph, he chose to give [him] a new six-pack, which only further proved that the line-up was not suggestive. Because the witness, Mr. Fierros, in the new line-up created by the Defense, identified [Zapien] again without hesitation." In other words, instead of being in position

6 in the original circled identification, Fierros was able to identify Zapien in the revised lineup in position 2.

The trial court found the defense had not met its burden that the August 2012 lineup was suggestive and found the identification procedure and process reliable. In coming to this conclusion, the trial court did a comparative analysis of the photos in court's exhibit 1 and noted "irregularities in left eyebrows" in three of the positions. The trial court also noted "different eyebrow configurations" among the photos in court's exhibit 3. And while noting Fierros was not asked additional questions concerning the identification process, the trial court stated it had also considered the police report, which described the identification made by Fierros of Zapien, and found the procedure was not impermissibly suggestive. The trial court then stated it

> "Respectfully den[ied] the motion … to find any taint in identification procedure. Find that the identification is not impermissibly suggestive that would give rise to a very substantial likelihood of irreparable misidentification. And not having found any tainted identification, respectfully deny the request to preclude identification presentation being made at the time of trial."

Zapien's Contention

On appeal, Zapien contends the trial court prejudicially erred when it did not allow him to show and question Fierros on court's exhibit 5 during the 402 hearing.[4] Zapien claims not allowing him to do so "completely thwarted" his efforts to show that the earlier lineup was unduly suggestive and should not be allowed for identification purposes. His reasoning is as follows: He showed Fierros court's exhibit 1, which was circled with Fierros's initials next to his identification of Zapien. He also showed him court's exhibit 3, which had the exact same photograph of Zapien but in a different position and without the circle and initials. Defense counsel was then hoping to show

[4] Court exhibit 5 is not in the appellate record, but counsel at oral argument stated it was the same as defense exhibit A.

court's exhibit 5, which had the same photograph of Zapien but also included a second photograph of Zapien, his booking photo (People's exhibit 16), which was taken on November 22, 2012. Defense counsel's strategy was that, if Fierros picked the "suggested" photo (the photo that showed Zapien with a slashed eyebrow) in the first lineup, he would likely pick the same photo in court's exhibit 3 and court's exhibit 5. But if Fierros then also failed to identify the booking photo of Zapien, also included in court's exhibit 5, defense counsel could argue that Fierros's identification was based on suggestion of who the perpetrator was rather than on an independent recollection of the perpetrator.

Applicable Law and Analysis

The purpose of a 402 hearing is to decide preliminary questions of fact upon which the admissibility of evidence depends. (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 209, fn. 6.) In determining the admissibility of evidence, the trial court has broad discretion. On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a 402 hearing, is reviewed only for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196–197.) We conclude the trial court here was within its discretion in excluding defense counsel from showing Fierros court's exhibit 5.

A violation of due process occurs "'if a pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [Citations.] "Whether due process has been violated depends on 'the totality of the circumstances' surrounding the confrontation. [Citation.]" The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]' [Citations.]" (*People v. Sanders* (1990) 51 Cal.3d 471, 508.)

Generally, a pretrial procedure will only be deemed unfair if it suggests, in advance of a witness's identification, the identity of the person suspected by the police.

(*People v. Hunt* (1977) 19 Cal.3d 888, 894.) However, there is no requirement that a defendant in a lineup, either in person or by photograph, be surrounded by others nearly identical in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is more distinguishable from the others in the lineup. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1215–1218 [where the defendant was the only person in jail clothing, although non-descriptive]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222 [where the defendant was the only one in a rather soiled red golf-style shirt when the perpetrator was described as wearing a red jacket].)

Here, Zapien contends the trial court erred when he was prevented from showing the suggestiveness of the procedure because he was not allowed to show Fierros court's exhibit 5, which included a booking photo of Zapien (as well as the previously identified photograph with the "slashed" eyebrow). The trial court sustained the prosecution's objection that the additional photograph was of poor quality and that the source of the photo was unclear.

When defense counsel attempted to show Fierros court's exhibit 5, the prosecution objected, noting that the photos in this lineup were dark and of poor quality and the source of the photographs unclear. No further questions were asked relative to court exhibit 5. To introduce such a photograph, a proper foundation must be laid to show it is a faithful representation of the person depicted. No attempt to lay such a foundation was made, nor was there any mention or request to attempt to obtain a better quality booking photograph depicting Zapien. There was no abuse of discretion in excluding court exhibit 5.

Even if we find that the trial court abused its discretion in excluding court's exhibit 5 during the initial 402 hearing, Zapien has failed to show prejudice. Under the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, which applies here, Zapien has not shown that it is reasonably probable a result more favorable to him would have

been reached in the absence of the error. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 120 [violation of state evidentiary rules reviewed under *Watson*].) Even if the *Chapman* harmless beyond a reasonable doubt standard applied, we would find no prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Keeping in mind that the purpose of the 402 hearing was to determine whether or not the initial lineup shown Fierros was unduly suggestive, Zapien fails to demonstrate how the trial court's exclusion of the photo lineup in court's exhibit 5 was prejudicial. There is nothing in the record to show that Fierros would not have been able to identify Zapien from the additional photo—in fact, Fierros was later shown the photo in a second 402 hearing and at trial and was able to identify Zapien from it.

Even if Fierros was unable to identify Zapien from the additional photo lineup, the record does not support a finding that such an outcome would have led to the exclusion of the prior identification as unduly suggestive. Zapien presented no evidence that the officers involved in the original lineup, which took place in August 2012, did anything suggestive prior to Fierros identifying Zapien. In fact, in making its ruling denying Zapien's request to exclude the earlier identification, the trial court read and considered the police report recounting the procedure used. In addition, the trial court did a comparative analysis of the individuals in the initial lineup and found it not unduly suggestive.

Even assuming error occurred in excluding court's exhibit 5 during the 402 hearing, that error was harmless under any standard.

B. DID THE TRIAL COURT ERR WHEN IT INTERFERED WITH ZAPIEN'S CROSS-EXAMINATION OF FIERROS?

Zapien next contends the trial court prejudicially erred when it interfered with his cross-examination of Fierros concerning the identification of Zapien, "deliberately tipping" him off to the correct answer. We disagree.

Background

At trial a second 402 hearing was held outside the presence of the jury on October 21, in which Fierros was asked to identify photos of Zapien in a lineup. During the hearing, defense counsel showed Fierros defense exhibit A, a photographic lineup containing two photographs of Zapien in the six-pack. When shown defense exhibit A, Fierros identified two people as Zapien, stating one looked like a younger version. Fierros testified that he was 100 percent sure on one of the photos (Position 6, from the August 2012 lineup) and "about 80 percent" sure on the other (Position 4, from the November 2012 booking photo).

Following the 402 hearing, Fierros testified in front of the jury and was asked by defense counsel to again identify Zapien in the lineup. When Fierros was shown defense exhibit A, the lineup that contained two photos of Zapien, Fierros was asked, "where do you see him?" Fierros responded "Number 6," to which defense counsel noted, "And for the record, Mr. Fierros has identified Position Number 6, which is the lower right-hand corner." The trial court then asked, "Is he in any other location?" Fierros responded, "Number 4 looks like him in a younger version. I would not select him 100 percent, but it looks like him, just younger."

Applicable Law and Analysis

The right of a trial judge to examine witnesses is not disputed. (*People v. Corrigan* (1957) 48 Cal.2d 551, 555, and cases cited therein; Evid. Code, § 775 [court may call witnesses].) Zapien argues, however, that in questioning Fierros, the judge improperly led Fierros to believe that he had missed a photograph in the lineup. No objection was made to the question asked of Fierros by the judge, nor did defense counsel make a motion to strike the question or answer. It is settled that a judge's examination of a witness may not be assigned error on appeal when no objection was made at the time the question occurred. (*Corrigan, supra*, at pp. 555–556.) Zapien has therefore forfeited this issue by his failure to object in the trial court.

In any event, we find Zapien's claim lacks merit. A trial judge has "'the power, discretion and affirmative duty … [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.'" (*People v. Carlucci* (1979) 23 Cal.3d 249, 256; see also *People v. Cook* (2006) 39 Cal.4th 566, 597; § 1044 [judge has duty to "control all proceedings during the trial … with a view to the expeditious and effective ascertainment of the truth regarding the matters involved"].) Here, the trial court was already aware of the fact that Fierros had identified two photos of Zapien in defense exhibit A during the second 402 hearing and simply asked a question to clarify what Fierros had earlier testified to.

Furthermore, even assuming error, Zapien cannot show prejudice. Following cross-examination by defense counsel, the prosecutor again questioned Fierros regarding the identifications at issue and Fierros again stated he was 100 percent certain on Position 6 and 80 percent certain on Position 4. The testimony on redirect was therefore the same as that provided in response to the trial court's question, negating any possible prejudice on the part of the trial court.

C. DID THE TRIAL COURT ERR WHEN IT OVERRULED ZAPIEN'S FOUNDATION OBJECTION TO COURT'S EXHIBITS 1 AND 3?

Zapien next contends the trial court prejudicially erred when it allowed the prosecution to admit court's exhibits 1 and 3 into evidence over defense counsel's objection on grounds of inadequate foundation. We disagree.

Background

As discussed above, defense counsel showed Fierros two different lineups during the first 402 hearing. Court's exhibit 1 was a copy of the lineup Fierros initially viewed in August 2012 identifying Zapien, with Zapien's photograph circled, initialed and dated. Court's exhibit 3 included the same photographs, but in different positions, and lacked

any of the additional marking. Fierros identified the same photograph in both lineups as being Zapien when he viewed them at the 402 hearing.

On direct examination in front of the jury, the prosecutor asked Fierros if he recalled defense counsel having shown him two different lineups at the 402 hearing outside the presence of the jury. Fierros stated he did. Defense counsel then asked for a sidebar, not reported, and the jury was asked to step outside.

Outside the presence of the jury, the trial court identified the lineups that had been marked as court's exhibit 1 and 3. The prosecutor argued that the parties had made a record that the photos identified by Fierros were of Zapien. He argued further that defense counsel created the lineups and if he was going to dispute that the photos were actually of Zapien, the prosecutor would have to call defense counsel or one of his staff as a witness.

Defense counsel countered that he was "not disputing" the lineup photos were of Zapien, but "there has been no evidence" of that fact. Defense counsel stated he had not sought to introduce the lineups, had not laid a foundation for them, nor "explained" that it was Zapien in the photos, and to state he had said on the record that it was Zapien would be incorrect.

The trial court noted that it was up to the jury to determine what the evidence was, and that it would permit the prosecution to show the photographs to the witness.

Defense counsel then objected to a lack of foundation. The prosecutor countered that it was "interesting" defense counsel provided no discovery as to how the lineups were created when he used them, but he was now using it as a "shield and sword to say there's no foundation." Defense counsel insisted that, if he was going to introduce the lineups into evidence, he would lay a foundation.

The trial court ultimately overruled defense counsel's objection, stating that it went to the weight of the evidence.

When direct examination resumed, the prosecutor presented court's exhibit 1 and asked Fierros if that was one of the lineups he had been asked to view during the initial 402 hearing. Fierros testified that he could not recall which lineups he was shown during the hearing, but he was able to identify photographs he believed to depict Zapien in court's exhibits 1 and 3. The trial court then granted the prosecution's request to admit the lineups into evidence.

Applicable Law and Analysis

Zapien argues that the trial court erred in overruling his objection to the admission of court's exhibits 1 and 3 on the basis of inadequate foundation. Specifically, he contends the trial court failed to require the prosecution to offer evidence of what the documents were, where they came from, who created them, when they were created, which if any of the photographs were of Zapien, and how that was verified. We find no abuse of discretion.

We review a trial court's ruling regarding the admissibility of evidence for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) Thus, we will affirm the evidentiary ruling unless the court acted in an arbitrary or unreasonable manner. (*Ibid.*)

Evidence Code section 1401, subdivision (a) requires that a writing be authenticated before it may be received into evidence. A photograph is a writing as defined by Evidence Code section 250. (*Goldsmith, supra,* 59 Cal.4th at p. 266.) To authenticate a writing, the proponent must establish that the writing is what "the proponent of the evidence claims it is." (Evid. Code, § 1400.) Thus, the proponent must present "sufficient evidence for a trier of fact to find that the writing is what it purports to be." (*Goldsmith, supra,* at p. 267 ["Essentially, what is necessary is a prima facie case"].) Conflicting reasonable inferences regarding authenticity bear on the document's weight as evidence, not its admissibility. (*Ibid.*) A photograph is usually authenticated by showing that it is an accurate and fair representation of the scene depicted. (*Ibid.*) It

may be authenticated by the person taking the photograph, by a witness to the event, circumstantial evidence, content, location, or any other means provided by law. (*Id.* at p. 268.)

Zapien's argument is somewhat confusing because defense counsel was the one who took the original lineup, used it and then rearranged it to see if Fierros could identify Zapien in a different position. It is odd that Zapien should now object to its authentication. Respondent argues that the lineups presented at the 402 hearing were marked as court exhibits and were the same two court exhibits shown to Fierros during his testimony in front of the jury. As such, respondent contends, the foundational requirements, that the lineups were the same lineups shown to Fierros during the 402 hearing, was properly established.

It is difficult to follow Zapien's argument. However, even assuming error was made, he cannot show prejudice. Court's exhibit 3 was a lineup created by defense counsel from the initial lineup shown to Fierros by Officer Guerrero, by all accounts court's exhibit 1, in which Fierros identified Zapien as the suspect. Prior to that initial lineup, Officer Guerrero admonished Fierros not to make his decision based on facial hair or tattoos and not make a selection unless he was 100 percent sure. Fierros testified he was 110 percent sure that Zapien was the man who held him at gunpoint and took him out to the orchard.

At trial, Fierros was also shown another lineup, defense exhibit A, by both defense counsel and then the prosecutor, in which Fierros identified two photographs as being Zapien, although he was less certain of one of the photographs than he was of the other. The parties later stipulated that defense exhibit A contained two photographs of Zapien.

In addition to the photographic lineups, both Fierros and Arreola testified to the length of time they had to look at Zapien's face during the incident, and both made in-court identifications of him. Arreola testified that there was no doubt in his mind Zapien was the individual in the passenger seat with the gun.

Although defense counsel sought to discredit the identifications Fierros and Arreola made, the evidence at trial both repeatedly and accurately identified Zapien as the gunman who threatened them. Any error in admitting the additional lineups without foundation was harmless pursuant to any standard of review.

D. DID THE TRIAL COURT ERR WHEN IT FAILED TO SUSTAIN ZAPIEN'S OBJECTION TO THE PROSECUTION'S MISSTATEMENT OF FACTS?

Zapien contends the trial court improperly sustained his objection to the prosecution's misstatement of facts. In a very brief and conclusory argument, without citations to the record or authority, Zapien contends the prosecution improperly argued during closing that "the photo in question" was Zapien and "falsely claimed" Zapien had stipulated to this. We find no error.

Background

As discussed throughout this opinion, several lineups were presented during the course of the trial. The parties ultimately stipulated that one of those lineups, defense exhibit A, contained two photos of Zapien. The stipulation, as read to the jury, was as follows:

> "It is stipulated between the parties, the Defense and the Prosecution, that in Defendant's Exhibit A, the person that is in both Position Number four and Number 6, they are both the Defendant, Jose Zapien. [¶] That the image in Number four was darkened and is the booking photograph from People's Exhibit Number 16, which shows the front view of the face of the Defendant. [¶] And that Defendant's Exhibit A was created by the Defense."

In closing, defense counsel argued in part that "we don't know" if the person identified by Fierros in People's Exhibit 14, the initial lineup shown to Fierros August 29, 2012, was actually Zapien.

In response, the prosecutor in closing recalled this statement by defense counsel and made the following statement:[5]

> "[I]f there was any question about it in the first place, if you recall during the trial, the Defense and the Prosecution, we stipulated. A stipulation is something that both parties admit that's true. There's no doubt about it, there's no dispute. If we agree and we stipulate, we're saying that's fact.…[¶] … [T]here was a stipulation where both the Defense and the People stipulated, agreed, undisputed, this line-up, Defendant's Exhibit A, was created by the Defense. You will notice in Defendant's Exhibit A, the individual in Number 6. The photograph is the same photograph in People's Exhibit 14. In the stipulation about the Defense's line-up, the Defense also stipulated the person in Number 6, that's the Defendant."

Defense counsel objected, stating "[f]acts not in evidence." The trial court overruled the objection, stating, "Ladies and Gentlemen of the jury can ask for the exhibits to be brought back to them or any read-back that they may wish."

Applicable Law and Analysis

We agree with respondent that this issue has been waived as Zapien provided no substantive argument or authority for his claim (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, overruled on other grounds in *People v. Compton* (1971) 6 Cal.3d 55; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99). However, we nevertheless address the issue and find no error.

A prosecutor's "'argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 736.) Here, the prosecutor's argument was a fair comment on the evidence and did not include facts not in evidence. During the argument, the prosecutor asked the jury to notice that the photograph in position 6 of defense exhibit A (which defense admitted, per the stipulation, was Zapien) was the same as the photograph in position 6 in People's exhibit 14. This argument did

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[5] We agree with respondent that it appears that this is the portion of the prosecutor's argument Zapien takes issue with.

not misstate any facts, it did not state that the parties had stipulated that the photographs were the same, but instead asked the jury to make that determination. There was no error on the part of the trial court in overruling defense counsel's objection.

E. DID THE TRIAL COURT ERR WHEN IT INSTRUCTED THE JURY THAT FIERROS POSITIVELY IDENTIFIED ZAPIEN OUTSIDE OF THEIR PRESENCE?

Zapien next contends it was error "for the court to instruct the jury that Mr. Fierros had positevely [*sic*] identified [Zapien] outside of their presence." (Capitalization, boldface, and underline omitted.) Again, Zapien's argument is very brief and conclusory, without citations to the record or authority. We find no error.

Background

During closing argument, defense counsel noted that he had wanted Fierros to meet with his investigators so that he could be shown "some photos without Mr. Zapien sitting 15 feet away," but that Fierros refused to do so. He later argued that, while Fierros identified Zapien in a lineup, the procedure used to create the lineup had been unknown. Defense counsel then mentioned "the preliminary hearing … in April of—."

At this point, the prosecutor asked for a sidebar. The prosecutor objected to various statements made by defense counsel, including his statement that he had asked to interview Fierros outside the presence of the jury. The prosecutor asked for a stipulation that Fierros had been asked to identify Zapien outside of Zapien's presence at Zapien's request, and that Fierros had actually identified Zapien twice in that situation at the questioning of defense counsel. The trial court directed the parties to work together on such a stipulation.

Following a recess, the prosecution proposed the following stipulation:

> "[Defense counsel] questioned Juan Fierros outside the presence of the jury. At his request, [Zapien] was not present in the courtroom. [Defense counsel] … showed … Juan Fierros two six-pack line-ups to Mr. Fierros that he created. [¶] … [¶] … Mr. Fierros identified [Zapien] in both line-ups."

Defense counsel proposed the following stipulation:

> "You've heard testimony that Juan Fierros was shown Court Exhibits 1 and 3 outside of your presence. Mr. Zapien had waived [¶] … [¶] his presence and was not present when these exhibits were shown to Mr. Fierros. Defense Counsel was not permitted to show Defense Exhibit B to Mr. Fierros when Mr. Zapien was not present."

The prosecution argued defense counsel's proposed stipulation failed to address the issue that, while Zapien was not present when Mr. Fierros was shown the lineups, Fierros was still able to identify him.

Following lengthy argument on the issue, the trial court proposed the following:

> "[Defense counsel] questioned Mr. Juan Fierros outside the presence of the jury at [defense counsel's] request…. [Defense counsel] showed Juan Fierros two six-pack line-ups that [defense counsel] created. Mr. Fierros identified [Zapien] in both line-ups."

The trial court stated that it could read the statement, or counsel could "indicate that in your argument or summation." The prosecutor stated he wished to have the trial court read it; defense counsel did not object.

The trial court then made the following statement to the jury:

> "Just to kind of clarify the record, … [defense counsel] had the opportunity and did question Mr. Juan Fierros outside the presence of the jury in this courtroom. Both counsel were present. [Defense counsel] showed Mr. Fierros … two six-pack line-ups that [defense counsel] created. Mr. Fierros identified [Zapien] in both of those line-ups."

When defense counsel resumed his argument, he stated the following:

> "Just to quickly explain what the Judge just read to you there, you were shown—this is Court's Exhibit 1. And … [the prosecutor] showed this to Juan Fierros, asked him about it, and talked about the fact that earlier when you … weren't present, he had seen this and he identified the photo in Position Number 6. The only detail the Judge was adding there is that you may not have been aware that Mr. Zapien had waived his presence and was not present then. So—and so in our position, though, is that yes, he did identify that photo. [¶] … [¶] … The only detail we needed to add is that you were not necessarily aware that Mr. Zapien had not been present when those were shown."

The trial court then added, "And that was at your request," to which defense counsel responded "Yes."

The jury was subsequently instructed with CALCRIM No. 3530 as follows:

> "Do not take anything I said or did during this trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be. It is not my roll to tell you what your verdict should be. [¶] You, Ladies and Gentlemen, are the sole judges of the evidence and the believability of the witnesses. It is up to you, and you alone, to decide the issues in this case."

Applicable Law and Analysis

Zapien's argument appears to be three-fold. First, he argues that, by making the statement to the jury about Fierros picking Zapien out of a lineup when Zapien was not present, "the court commented on the evidence without giving CALCRIM 3530, which it had a sua sponte duty to give." We reject this argument outright as the trial court did give the instruction.

The second part of Zapien's argument is that the trial court's comment on the evidence was not accurate and highly prejudicial, arguing "Fierros never picked [Zapien] out of a photo lineup outside of the jury's presence and there was no evidence offered that [defense counsel] created the lineup."

Article VI, section 10 of the California Constitution provides, in pertinent part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." Our Supreme Court has interpreted this provision to require that such comment "'be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.'" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; accord, *Patton v. United States* (1930) 281 U.S. 276, 288.) Thus, a trial court has "broad latitude in fair

commentary, so long as it does not effectively control the verdict." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 768.) "We determine the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs." (*People v. Cash* (2002) 28 Cal.4th 703, 730.)

We note first that Zapien failed to preserve this issue for review by interposing a timely objection to the court's comments. (*People v. Boyette* (2002) 29 Cal.4th 381, 459; *People v. Cash, supra,* 28 Cal.4th at p. 730.) Even assuming the claim had been preserved, we find no error.

Here, the statement by the trial court was accurate. The testimony at trial established that Fierros had been shown multiple lineups by defense counsel and that he made identifications in all of them. Although Zapien argues on appeal that there was no evidence that the photographs identified by Fierros were actually of Zapien, the record supports the argument that the photograph of Zapien identified by Fierros in court's exhibit 1 and 3 was the same photograph that was contained in defense exhibit A, which the parties stipulated was Zapien.

Zapien finally argues "whether or not Mr. Fierros picked [Zapien] out of a photo lineup near the time of the incident was certainly a material fact, and it should not have been withdrawn from the jury's consideration." However, that fact was not withdrawn from consideration. As noted above, the jurors were told by the trial court, pursuant to CALCRIM No. 3530, "Do not take anything I said or did during this trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be. It is not my role to tell you what your verdict should be. [¶] You, Ladies and Gentlemen, are the sole judges of the evidence and the believability of the witnesses. It is up to you, and you alone, to decide the issues in this case."

The trial court's clarification was not erroneous and we reject Zapien's claim to the contrary.

PART II

Zapien next makes two arguments alleging prosecutorial misconduct. We address both claims separately and find no error.

A. DID THE PROSECUTOR COMMIT MISCONDUCT IN QUESTIONING WITNESSES?

Zapien first contends that the prosecutor committed misconduct by encouraging and allowing inadmissible and prejudicial gang evidence to be introduced. In making this argument, Zapien references the testimony of Fierros and Officer Strand, claiming there appeared to be "a concerted effort by the prosecution to circumvent the court's order not to introduce gang evidence." We find no prejudicial error.

Background

Prior to trial, defense counsel filed motions in limine, including a motion to exclude all gang evidence as there were no gang allegations in the case. The prosecution acknowledged that there were no gang allegations and that it was not going to seek to admit gang expert testimony, only "evidence of street checks, but not for the gang purpose." Based on this statement, defense counsel withdrew the motion.[6]

At trial Fierros testified on direct examination that he left the state to protect his family. The prosecutor then asked if Fierros "recall[ed] testifying in 2013 at a prior court hearing," and "after one of those days of … testimony, being followed out to [his] car." Fierros said he did, and when asked what those individuals looked like, he replied, "Gang related."

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[6] Zapien contends that it was "stipulated" between the parties that he was not being charged with a gang-related crime, that the prosecution was required to instruct its witnesses not to say whether or not the crime was gang-related, and the prosecution was not to ask any questions that would illicit such a response. The record does not support this claim. There does not appear to have been a stipulation at this point, but that defense counsel withdrew the motion in limine as discussed above.

Defense counsel requested a sidebar and, following some discussion, the prosecutor read the following stipulation into the record:

> "It's stipulated between the parties that the Defendant in this case is not being charged with a gang-related crime."

Direct examination of Fierros resumed and no further questions were asked about the parking lot incident.

On cross-examination, defense counsel questioned Fierros about the individuals involved in the instant offense:

> "[Defense Counsel]: And you told the officers that the—about the passenger, who was referred to as Tinman by the other subjects and who had the eyebrow piercing, also had a tattoo of an N on his upper left arm, correct?
>
> "[Fierros]: Yes.
>
> "[Defense Counsel]: And you didn't say that you weren't sure—at that time, you didn't say whether it was an N or not. You said it was an N?
>
> "[Fierros]: I just assumed it was an N because where I live at, there's nothing but Nortenos. So I wouldn't see why would he have a Z versus an N. I figured it was an N and they were all wearing red, so I knew they were gang members."

Defense counsel did not object to these responses and did not move that they be stricken from the record.

Following a break in testimony, defense counsel stated that he had spoken to the prosecutor about the incident that happened outside of the courthouse at the prior trial. The prosecutor agreed that he would not ask any further questions about it, and defense counsel would not ask that anything be stricken.

Later, Officer Michael Strand testified for the prosecution. When asked to observe a photograph of Zapien, Officer Strand stated that Zapien had a tattoo on his left forearm that included "skulls, and a large letter D, as in Delano, in old English format." On cross-examination, defense counsel asked Officer Strand if Zapien had a tattoo of the letter N

"anywhere on him." Officer Strand replied, "That's not correct. He has the tattoo of the letter N, if my memory served correctly, on his right hand." Defense counsel asked if Zapien had the letter N tattooed on his left arm. After reviewing photos, Officer Strand responded, "You know what's interesting, the D on his left arm could be construed as an N due to more ink on the bottom of the letter D." Officer Strand also stated Zapien had the letter N, "as in Norteno," tattooed on his right thumb. Defense counsel did not object or ask that anything be stricken from the record.

Applicable Law and Analysis

Zapien now contends that these questions the prosecutor asked Fierros and Officer Strand constituted prosecutorial misconduct because the questions implied facts harmful to the defense.[7]

Our Supreme Court has held that a prosecutor commits misconduct by asking "a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means." (*People v. Price* (1991) 1 Cal.4th 324, 481.) For a prosecutor's question implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, *but for the improper question,* the jury would not have otherwise heard. (See *People v. Warren* (1988) 45 Cal.3d 471, 481 [describing the gist of the misconduct as implying in the question "facts [the prosecutor] could not prove"].) Moreover, if "the prosecutor is not asked to justify the question, a reviewing court is

[7] Zapien also argues the prosecutor committed misconduct when he falsely argued in closing that defense counsel had stipulated that a photo in one of the lineups was Zapien. We addressed that issue in another context in part I.D. of the Discussion and found that the prosecutor accurately stated the parties' stipulation, so we do not address it again here.

rarely able to determine whether this form of misconduct has occurred." (*People v. Price*, *supra*, at p. 481.)

"[T]o preserve the issue of prosecutorial misconduct on appeal, the defendant must both object and request a curative admonition unless such admonition would have failed to cure any prejudice." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1073, abrogated on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) With regard to the questions asked of Fierros and Officer Strand by the prosecutor, Zapien failed to object to the questions as misconduct and did not request a curative admonition from the trial court. Nor has he established that such an objection would have been futile. Therefore, he has not preserved the claim on appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Cain* (1995) 10 Cal.4th 1, 48.)

Even assuming the issue has been preserved, we find no error. We note that two of the three gang-related comments were made in response to questions posed by defense counsel, not the prosecutor. The response solicited by the question from the prosecutor was resolved by the comment by the judge that Zapien was not being charged with a gang-related charge. Defense counsel did not challenge the gang-related responses to his two questions. There is no evidence in the record to support the notion that the prosecutor asked Fierros and Officer Strand questions in order to elicit inadmissible testimony. (*People v. Scott* (1997) 15 Cal.4th 1188, 1218 ["Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct."].)[8]

And even assuming misconduct occurred, we find no prejudice. Reversal for prosecutorial misconduct is not required unless the defendant has been prejudiced by the

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8 We do not address Zapien's claim that the other answers provided by the witnesses he complains of, which were given on cross-examination in response to defense counsel's questioning, somehow provide the basis for a claim of prosecutorial misconduct. He provides absolutely no authority for this claim.

misconduct. This occurs only if it is reasonably probable that the defendant would have obtained a more favorable result absent the misconduct. (*People v. Arias* (1996) 13 Cal.4th 92, 161; *People v. Castillo* (2008) 168 Cal.App.4th 364, 386–387.) Here, it is not reasonably probable Zapien would have obtained a better result had the prosecutor not asked the questions at issue that elicited responses alluding to gangs.

The parties stipulated and the jury was told that Zapien was not being charged with a gang-related crime. Moreover, the jury was instructed with a special instruction that explained Zapien's appearance, including his tattoos, was only relevant to the issue of eyewitness identification and could not be used for any other purpose. And finally, both eyewitnesses identified Zapien as the perpetrator of the crimes. As such, it is not reasonably probable Zapien would have obtained a more favorable result absent the brief references to Norteños and Delano. We reject Zapien's claim to the contrary.

B. DID THE PROSECUTOR COMMIT *BRADY*[9] ERROR?

Zapien finally contends that the prosecutor failed to disclose material impeachment evidence in violation of *Brady*, *supra*, 373 U.S. at p. 87. Specifically, Zapien contends that Deputy Galvez, who testified at trial, actively concealed misconduct covering a span of several months, which negatively reflected on his character for truth and veracity and could be used to impeach him. We find no error.

Background

At trial, on October 24, 2016, Sheriff's Deputy Rosalio Galvez's testimony was limited to his actions when he first responded to the scene of the crime on April 15, 2012. Deputy Galvez testified he was dispatched to the scene around 8:00 p.m. on April 15, 2012, where he observed three vehicles parked on a dirt road. According to Deputy Galvez, one of the vehicles was an SUV that "was lifted up and missing some of the rear wheels."

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9 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

Deputy Galvez then testified he observed one of the vehicles begin to drive away and a Hispanic man run from the area and get into another vehicle. Deputy Galvez pursued the vehicles, but none yielded to him and he eventually discontinued the pursuit due to the road conditions.

Deputy Galvez did not identify anyone involved in the crime and did not testify regarding any of the follow-up investigation that led to Zapien's identification. Defense counsel did not cross-examine Deputy Galvez.

In Zapien's April 2017 motion for new trial, defense counsel alleged the prosecution committed *Brady* error when it failed to provide impeachment evidence regarding Deputy Galvez. In the motion, defense counsel submitted that Deputy Galvez had "been the subject of an investigation in May of 2016 for conduct unbecoming to an officer." Defense counsel supported his position by attaching an internal affairs investigation report that documented allegations that Deputy Galvez was involved in sexual conduct with an 18- or 19-year-old woman while on duty. Defense counsel argued that "Deputy Galvez' actions of actively concealing misconduct covering a span of several months clearly goes to his character for truth and veracity, and would undoubtedly have been useful impeachment material."

Applicable Law and Analysis

Under *Brady,* the prosecution violates a defendant's federal due process rights when it suppresses evidence material to the defendant's guilt or punishment, regardless of the good faith belief of the prosecution. (*Brady, supra*, 373 U.S. at p. 87.) Prosecutors have a duty to disclose "material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation]." (*In re Brown* (1998) 17 Cal.4th 873, 879.) There are three elements to a *Brady* violation: (1) the state withholds evidence, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching; and (3) the evidence is material. (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282.) As to the last element,

"[e]vidence is material if there is a reasonable probability its disclosure would have altered the trial result." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Put another way, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 435; *People v. Hoyos* (2007) 41 Cal.4th 872, 917–918 [defendant has the burden of showing materiality], abrogated on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 641.) "Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review." (*Zambrano, supra*, at pp. 1132–1133.)

We agree with respondent that Zapien fails to satisfy all three prongs of *Brady*. First, Zapien has not established that the prosecution withheld the evidence, either willfully or inadvertently. In his motion for new trial, defense counsel provided the internal affairs report that noted the conduct at issue occurred between "late 2015 and early 2016." The report itself noted that the investigation began in May of 2016 and he was placed on administrative leave shortly after November 3, 2016; Deputy Galvez's testimony at trial took place on October 24, 2016. There is no evidence the prosecution was aware of the internal affairs investigation during trial, and as soon as the prosecution became aware of the disciplinary action, it informed defense counsel and advised him to file a *Pitchess*[10] motion.

Nor has Zapien established that the information regarding Deputy Galvez would have been favorable to him. Although Zapien alleges Deputy Galvez's conduct "goes to his character for truth and veracity, and would undoubtedly have been useful

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10 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

impeachment material," his conduct does not appear to be relevant to impeaching his testimony in the instant case. Deputy Galvez's testimony was very limited in nature, he did not identify anyone involved in the crime, and did not testify regarding any follow-up investigation in the crime or Zapien's identification. There is a lack of relevance between Deputy Galvez's limited testimony and the conduct that led to the internal affairs investigation.

Finally, Zapien fails to establish the evidence was material and therefore prejudicial. Impeachment evidence is generally material "'where the witness at issue "supplied the only evidence linking the defendant to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citations].'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1050.) A new trial is generally not required when the testimony of a witness is corroborated by other testimony. (*Ibid.*)

Deputy Galvez's testimony did not supply any evidence linking Zapien to the crime. Instead, he provided relatively insignificant details regarding his observations when he first arrived at the scene. Impeachment of his testimony would not "have undermined a critical element of the prosecution's case." (*People v. Salazar, supra,* 35 Cal.4th at p. 1050.)

Zapien has failed to establish the materiality of the undisclosed evidence and there is no reasonable probability that, had the evidence been disclosed to defense counsel, the result of the proceeding would have been different. (*People v. Hoyos, supra,* 41 Cal.4th at pp. 917–918.) We find no *Brady* error.

PART III

A. IS THERE CUMULATIVE ERROR?

Finally, we address Zapien's argument that all the issues he presents "should be considered as a whole when determining their prejudicial effect." We have either rejected Zapien's claims of error and/or found any errors, assumed or not, were not

prejudicial. Viewed cumulatively, we find any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed.

_____
FRANSON, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
DESANTOS, J.